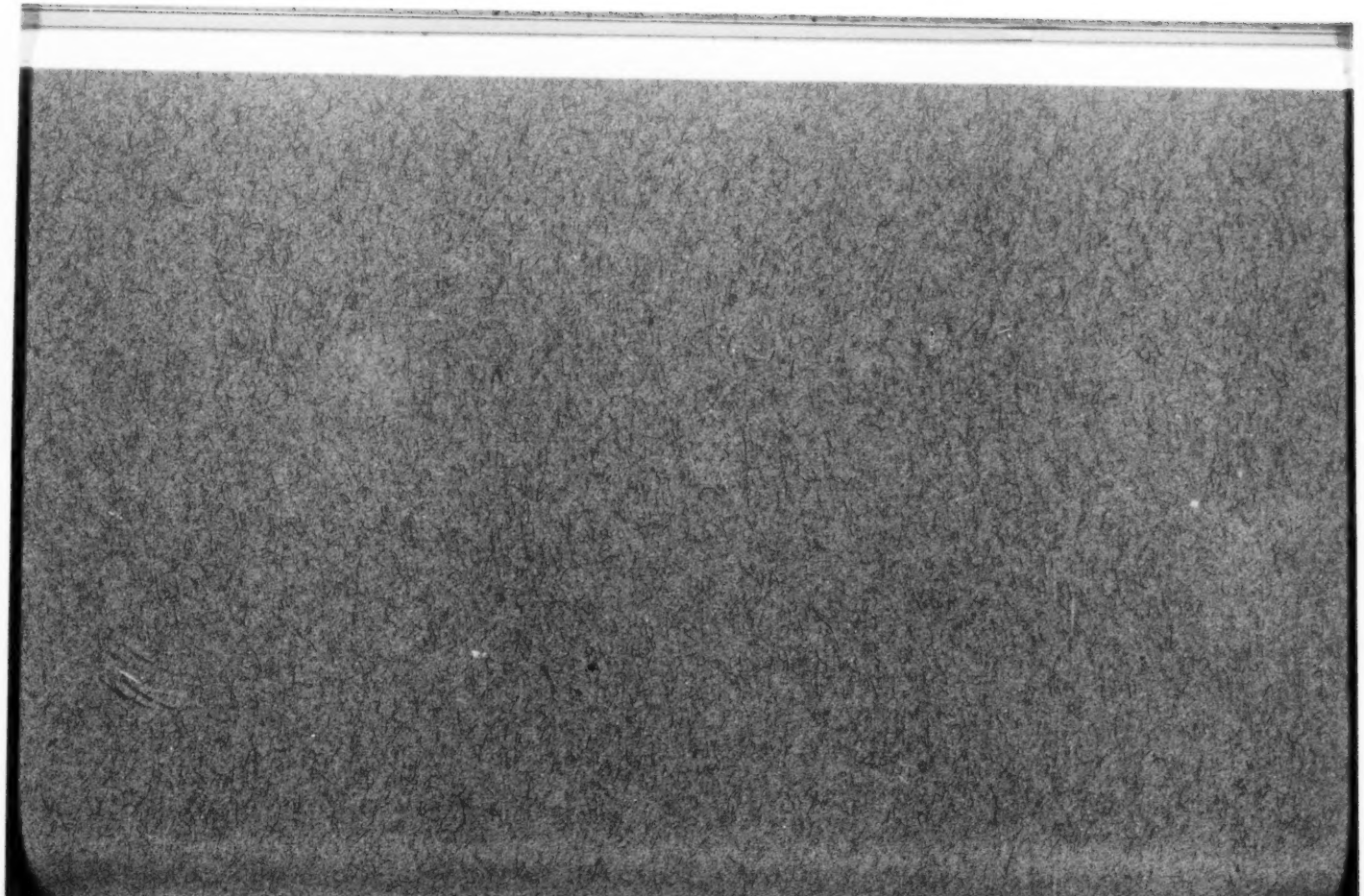
In the



INDEX

CITATIONS

576828—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 700

NORMAN G. BAKER, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion has been rendered by the circuit court of appeals, petitioner having filed his petition for a writ of certiorari prior to hearing and submission in that court. The oral opinion of the district court discharging the writ of habeas corpus appears at pages 33–34 of the record and the court's findings of fact and conclusions of law appear at pages 20–21.

JURISDICTION

The judgment of the District Court for the District of Kansas discharging the writ of habeas

corpus was filed November 2, 1943 (R. 21), and petitioner filed a notice of appeal to the circuit court of appeals on December 1, 1943 (R. 21–22). The petition for a writ of certiorari before hearing and submission in the circuit court of appeals was filed February 15, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. 3, 9). See also Section 8 (b) of the Act of February 13, 1925 (28 U. S. C. 350).

QUESTIONS PRESENTED

Whether Rule V of the Criminal Appeals Rules promulgated by this Court May 7, 1934, is a proper exercise of the rule-making power conferred upon this Court by the Act of February 24, 1933, as amended (18 U. S. C. 688).

STATUTES AND RULE INVOLVED

The Act of February 24, 1933, c. 119, 47 Stat. 904, as amended by the Act of March 8, 1934, c. 49, 48 Stat. 399 (18 U. S. C. 688), provides in pertinent part as follows:

> SEC. 1. The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, * * *.

> SEC. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

Rule V of the Criminal Appeals Rules promulgated by this Court May 7, 1934 (292 U. S. 661), provides:

> An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence.[1]

The Act of June 29, 1932, c. 310, § 1, 47 Stat. 381 (18 U. S. C. 709a), provides:

> The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided,* That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the

[1] This rule was amended insofar as fines are concerned subsequent to the filing of the notice of appeal. (18 U. S. C., Sup. II, following 689.)

date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Arkansas on seven counts charging use of the mails in the execution of a scheme to defraud and was, on January 25, 1940, sentenced generally to pay a fine of $4,000 and to imprisonment for four years in an institution of the penitentiary type to be designated by the Attorney General. The judgment required that a certified copy thereof be delivered to the marshal to serve as the commitment (R. 13–14). That same day petitioner was delivered by the marshal to the county jail at Little Rock, Arkansas (R. 14). The next day, January 26, 1940, petitioner filed a notice of appeal from the judgment of conviction (R. 7, 14). Applications for bail pending appeal were denied, both by the district court and the circuit court of appeals (R. 7–8, 14), and petitioner remained in the county jail. On January 31, 1940, he wrote to the marshal stating that until further notice he elected to remain at the county jail instead of beginning service of his sentence in a federal prison (R. 18; see also R. 14). The Circuit Court of Appeals for the Eighth Circuit affirmed petitioner's conviction on November 20, 1940 (R. 16; see 115 F. (2d) 533), and this Court denied cer-

tiorari on February 17, 1941 (312 U. S. 692), and denied rehearing on March 3, 1941 (312 U. S. 715). The mandate of the circuit court of appeals was issued on March 13, 1941, and was filed in the district court on March 15, 1941 (R. 16; see also R. 14). Petitioner was delivered to the United States penitentiary at Leavenworth, Kansas, on March 22, 1941 (R. 14).

On August 2, 1943, petitioner filed in the District Court for the District of Kansas an application for a writ of habeas corpus in which he contended that the time spent in the county jail during the pendency of his appeal was in execution of his sentence and that, with good time allowance, he was entitled to his release (R. 4–13).[2] Respondent demurred to the petition (R. 17), a writ of habeas corpus ad testificandum issued (R. 19), and after a hearing, at which petitioner was present and represented by counsel (R. 21, 26–34), the district court on November 2, 1943, discharged the writ of habeas corpus and remanded petitioner to the custody of respondent (R. 21); the court held that by virtue of Rule V of the Criminal Appeals Rules the execution of

[2] In 1941 petitioner sought to obtain his release on habeas corpus on the ground that he was prejudiced at his trial by the conduct of the jurors and the deputy marshals who had them in charge. After a hearing the district court determined the issues against petitioner and discharged the writ. The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit (129 F. (2d) 779) and this Court denied certiorari (317 U. S. 681, rehearing denied, 317 U. S. 711).

petitioner's sentence was stayed by his appeal and, therefore, he was not entitled to credit for the time spent in the county jail pending the appeal (R. 33–34; see also R. 20–21).

On December 1, 1943, petitioned filed a notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit (R. 21–22).[3]

ARGUMENT

Petitioner's right to be released at the present time depends upon whether he is entitled to credit for the time he spent in the county jail from January 26, 1940, when he filed his notice of appeal, to March 15, 1941, when the mandate of the circuit court of appeals was filed in the district court (see pp. 4–5, *supra*). If that time is credited against his sentence, petitioner has already served the maximum term of four years; if not, petitioner's maximum term will expire in March 1945, and, unless his remaining good time allowance is forfeited, he will be entitled to his conditional release on July 19, 1944.[4]

Under Rule V of the Criminal Appeals Rules promulgated by this Court May 7, 1934, the filing of petitioner's notice of appeal resulted in an automatic stay of the execution of his sentence

[3] We are advised by the office of the Clerk of this Court that the argument in the circuit court of appeals is set for March 23, 1944.

[4] The record shows (R. 20, 23) and the Bureau of Prisons advises us that 100 days of petitioner's good time allowance were forfeited on April 8, 1943.

in the absence of an election to commence service pending appeal. Petitioner did not so elect. On the contrary, he affirmatively elected not to enter upon service of his sentence (R. 18).[5] Hence, there can be no question that, if Rule V is valid, petitioner is not entitled to credit on his sentence for the time spent in the county jail pending his appeal.

Petitioner contends (Pet. 12, 13–15, 19–21) that Rule V embodies a matter of substantive law, the regulation of which Congress could not constitutionally delegate to this Court. It is unnecessary to determine whether, as petitioner argues (Pet. 21), the right to prescribe "what facts shall constitute service of a sentence" is a matter of substantive law, for it is clear that Rule V does not relate to such facts. Rule V is merely a regulation of the terms and conditions of appeals in criminal cases. Historically, the power to stay enforcement of a judgment pending the outcome of an appeal has always been considered part of an appellate court's "traditional equipment for the administration of justice". *Scripps-Howard Radio* v. *Federal Communications Comm'n,* 316 U. S. 4, 9–10. After the passage of the Act of March 3, 1891 (26 Stat. 827), conferring upon a

[5] As the district court stated (R. 23; see Pet. 26), this notice was unnecessary, since under Rule V the filing of the notice of appeal stayed execution of the judgment. The notice does, however, establish beyond dispute that petitioner did not elect to commence service of his sentence pending the appeal.

person convicted of an infamous crime the right of review by this Court, the Court said that it had power to issue a supersedeas in such a case under its authority to issue "all writs * * * necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law." *In re Claasen,* 140 U. S. 200, 207–208; see also *Hudson* v. *Parker,* 156 U. S. 277, 284. The Court also said in the *Claasen* case (p. 208) that under the general statutes governing supersedeas, a Justice of this Court had power to grant a stay in a criminal case, but, to remove all doubt on the subject, the Court announced in the *Claasen* decision that it had adopted a general rule governing the granting of supersedeas in such cases by a Justice (see also *Hudson* v. *Parker, supra,* at 283). The substance of this rule was carried through subsequent revisions of the rules of this Court.[6]

Prior to 1934, Congress chose to regulate by statute the conditions upon which a supersedeas could be granted in order to avoid the common law rule that a writ of error in itself operated as a stay of execution.[7] This fact, however, does not affect the judicial character of the relief afforded by a supersedeas pending appeal and does not prevent Congress from delegating to the courts the power to regulate the conditions thereof. As

---

[6] See *Tinkoff* v. *United States,* 86 F. (2d) 868, 882 (C. C. A. 7), certiorari denied, 301 U. S. 689.

[7] *Kitchen* v. *Randolph,* 93 U. S. 86, 87; see also *Tinkoff* v. *United States, supra,* at 881.

early as 1825, in *Bank of the United States* v. *Halstead,* 10 Wheat. 51, 60, this Court stated, in respect of an analogous question as to the authority of the courts to prescribe what property shall be subject to execution:

> It is said, however, that this is the true exercise of legislative power, which could not be delegated by congress to the courts of justice. But this objection cannot be sustained. * * * Congress might regulate the whole practice of the courts, if it was deemed expedient so to do: but this power is vested in the courts; and it never has occurred to any one, that it was a delegation of legislative power.[8]

The Federal Rules of Civil Procedure (Rules 72 and 73), regulate the conditions of supersedeas on appeals in civil cases and modify prior statutes with respect thereto, although the enabling act (28 U. S. C. 723b, 723c) contains no express grant of power to regulate the terms and conditions of appeals.[9] There can be no question, therefore, that the grant of authority to this Court under the Act of February 24, 1933 (28 U. S. C. 688), to prescribe by rule the conditions on which

[8] See also *Wayman* v. *Southard,* 10 Wheat. 1, 41, 44; *Beers* v. *Haughton,* 9 Peters 328, 359; Scott, *Actions at Law in the Federal Courts,* 38 Harv. L. Rev. 1, 3 (1924).

[9] See Notes to Rules 72 and 73 of the Rules of Civil Procedure prepared by the Advisory Committee in U. S. C. (1940 ed.). Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure,* 49 Harv. L. Rev. 1303, 1312–1320 (1936); see also Foreword (pp. XI–XII) to Preliminary Draft of the Rules (May 1936).

supersedeas may be allowed involves no unconstitutional delegation of legislative power.

Nor is there any merit in petitioner's contention (Pet. 13, 22–28) that in conferring upon this Court the specific authority to prescribe conditions on which supersedeas or bail may be allowed, Congress did not authorize the Court to lay down a rule which would operate automatically without reference to the circumstances of each individual case. In accordance with its powers to fix conditions of supersedeas, this Court in Rule V prescribed that an appeal is the only condition for a stay. Prior to the promulgation of the Rules, this was not so. The supersedeas had to be allowed by a court or judge and in the absence of such an allowance the defendant could be compelled to enter upon service of his sentence pending appeal. *Tinkoff* v. *United States,* 86 F. (2d) 868, 881–883 (C. C. A. 7), certiorari denied, 301 U. S. 689; Longsdorf, *Cyclopedia of Federal Procedure,* Vol. 5, p. 813. In accordance with their purpose to simplify procedure, the Rules eliminated the necessity for the allowance of supersedeas, just as they eliminated the necessity for allowance of an appeal, but they preserved the right of the defendant to commence service of his sentence pending appeal if he wished to do so. In practical effect, the rights of the defendant remain the same; only the procedure was changed. He may, if denied bail, remain in temporary custody pending appeal or he may serve his sentence during such period.

However, both before and after the promulgation of Rule V, if a defendant whose application for bail had been denied chose not to enter upon service of his sentence, he was not entitled to have the time spent in custody pending appeal credited against his sentence. *Dimmick* v. *Tompkins,* 194 U. S. 540, 549; *Demarois* v. *Hudspeth,* 99 F. (2d) 274, 275 (C. C. A. 10), certiorari denied, 305 U. S. 656; *Mosheik* v. *Bates,* 87 F. (2d) 221, 222 (App. D. C.); *Steinberg* v. *Cummings,* 14 F. Supp. 647 (M. D. Pa.), affirmed, 85 F. (2d) 1022 (C. C. A. 3), certiorari denied, 299 U. S. 602; *Smith* v. *Hiatt,* 48 F. Supp. 747, 749 (M. D. Pa.); *Von Baden* v. *Hiatt,* 47 F. Supp. 683 (M. D. Pa.). Petitioner's choice in remaining in the county jail was just as voluntary as if, under the old practice, he had obtained a supersedeas. If he did not wish to have the execution of the judgment stayed after bail had been denied, he could have elected to commence service of his sentence.[10]

Contrary to petitioner's contention (Pet. 4, 12, 17–21), there is no conflict between Rule V and 18 U. S. C. 709a, which provides in part that a sentence commences to run from the time a pris-

[10] The refusal to admit petitioner to bail was undoubtedly proper in view of the policy embodied in Rule V of the Criminal Appeals Rules to restrict bail to cases involving substantial questions. See Brief for the United States in Opposition in *Spalek* v. *United States,* No. 588, this Term, p. 11. In any event, however, it is clear that petitioner cannot collaterally secure a review of such refusal by seeking to obtain credit for the time spent in the county jail after he chose not to enter upon service of his sentence pending appeal.

oner is delivered to a jail to await transportation to a penitentiary. Assuming that the day petitioner spent at the county jail before he filed his notice of appeal was a day during which he was confined to await transportation, and therefore a day served in execution of sentence,[11] the moment that he filed his notice of appeal the execution of his sentence was stayed by virtue of Rule V. He could not thereafter have been transported to the penitentiary until his appeal was terminated unless he filed a notice of election to commence service of his sentence. After his notice of appeal was filed, in the absence of an election to serve his sentence, petitioner's incarceration was not to await transportation to the penitentiary but to await the outcome of the appeal. Cf. *Demarois* v. *Hudspeth, supra.* With respect to credit for the time spent in the county jail, petitioner's situation is the same as if he had been granted release on bail on the day he filed his notice of appeal; he had served one day in execution of his sentence and thereafter the execution was suspended until disposition of the appeal. The purpose of Section 709a was to insure that prisoners would receive credit for the time they might spend awaiting transportation to the penitentiary. *Brown* v. *Johnston,* 91 F. (2d) 370, 372 (C. C. A. 9), certiorari denied, 302 U. S. 728; *Demarvis* v.

[11] We are informed that, administratively, convicted defendants are credited with the time so spent before a notice of appeal is filed.

Hudspeth, supra. That statute does not relate to supersedeas and does not purport to deprive the courts of their power to stay execution of sentences; the power, as we have seen (*supra,* pp. 7–8), existed long prior to the enactment of Section 709a in 1932, and Rule V is merely an exercise of that power pursuant to the enabling act of 1933.[12]

CONCLUSION

Petitioner's contentions are without merit and there is therefore no occasion for this Court to exercise its extraordinary power to grant review before judgment in the circuit court of appeals. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
Special Assistant to the Attorney General.
BEATRICE ROSENBERG,
Attorney.

MARCH 1944.

[12] The fact that, under the old supersedeas procedure, it might have been necessary if execution had commenced, that the writ be directed to the officer holding the execution (see Pet. 28), does not mean that this Court was bound to continue that practice. Under Rule V the filing of a notice of appeal is in itself a sufficient direction. In this case the marshal was informed of the filing of the notice of appeal and, in accordance with Rule V, he did not deliver petitioner to the penitentiary for service of the sentence (see R. 14).

U. S. GOVERNMENT PRINTING OFFICE: 1944